In the

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1291

GEORGE EDWARD FEIN,
Petitioner,

VERSUS

STATE OF OKLAHOMA and LARRY DERRYBERRY, as
Attorney General of the State of Oklahoma,
Respondent.

BRIEF OPPOSING CERTIORARI

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STATEMENT OF CASE

The petitioner, George Edward Fred, hereinafter referred to as petitioner, was charged and tried in the District Court, Grady County, Oklahoma, Case No. CRF 73-16, for the offense of Murder. He was convicted by a jury for the lesser included offense of Manslaughter in the First Degree, in violation of 21 O.S. 1971, § 711. His punishment was fixed at thirty-five (35) years imprisonment. The petitioner then perfected his appeal to the Oklahoma Court of Criminal Appeals which, on January 8, 1975 affirmed the petitioner's conviction (Appeal No. F-74-263). On February 18, 1975, the Court of Criminal Appeals denied Petitioner's petition for rehearing and directed the issuance of the mandate.

STATEMENT OF FACTS

The respondent does hereby adopt the Statement of Facts as recited by the petitioner, but reserves the right to refer to certain portions in which it may be in disagreement.

REASONS FOR NOT GRANTING THE WRIT

STATEMENTS ATTRIBUTABLE TO PETITIONER ON THE 12TH AND 13TH DAYS OF FEBRUARY, 1973, ARE ADMISSIBLE BECAUSE THEY WERE VOLUNTARILY GIVEN AFTER PETITIONER WAS ADVISED OF HIS CONSTITUTIONAL RIGHTS AND INTELLIGENTLY WAIVED THE SAME.

The petitioner contends that his incriminating statements were inadmissible because they were allegedly obtained under conditions inherently coercive in nature in violation of petitioner's constitutional rights. Petitioner's contention is based upon three allegations: (1) that petitioner's arrest was illegal; (2) petitioner was held incommunicado and (3) that petitioner's physical and mental condition rendered his statements involuntary. The respondent respectfully submits that petitioner's contention is groundless and totally without merit.

Petitioner contends that his arrest and detention were illegal. The respondent, however, submits that petitioner's arrest was legal and based upon sufficient probable cause. The facts and evidence reveal that the State had probable cause to arrest petitioner on the charge of larceny of the deceased's television. The police and jail records reveal that petitioner was indeed charged with larceny of the television on the 13th day of February, 1973 (Motion Hearing, pages 52, 53-A). See 22 O.S. 1971, §186, 22 O.S. 1971, §190

and *Henry* v. *State*, Okla. Cr., 494 P.2d 661 (1972), and *Battles* v. *State*, Okla. Cr., 459 P.2d 623 (1969).

The respondent further submits that mere delay in arraignment of prisoner will not render the statement or confession involuntary nor inadmissible if it is otherwise shown to be voluntary and given without coercion, fear produced by threats or mistreatment, or promises of such a nature that would induce defendant to relate an untruth. *Thacker* v. *State*, Okla. Cr., 309 P.2d 306 (1957).

The respondent would submit that the record is replete with repetition of petitioner's right to remain silent, that anything he said could be used against him in a court of law, that he had the right to the presence of an attorney, and that if he could not afford an attorney one would be appointed for him prior to questioning if he so desired. Petitioner was afforded the option to exercise his rights throughout the interrogation. *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602.

It is further submitted that the petitioner consistently, knowingly and intelligently waived those rights and agreed to answer questions and make a statement. The respondent maintains the trial court properly ruled on the legality of the arrest and voluntariness of subsequent statements (Tr. 234).

The petitioner also contends that he was held incommunicado without counsel. The respondent submits that this is not true. The record reveals that petitioner consistently waived right to counsel (Tr. 212-236).

Petitioner attempts (petitioner's brief, page 16) to leave the impression that he was interrogated for a period

of over 36 hours and not taken before a magistrate for another 36 to 40 hours. The respondent respectfully submits that the record reveals that petitioner was charged with Murder on the 13th day of February, 1973, an arrest warrant issued on February 14, 1973, and petitioner was taken before a magistrate on February 15, 1973. Also see *Thacker* v. *State, supra.*

Petitioner further contends, regarding the petitioner's confession at OSBI (Oklahoma State Bureau of Investigation) Headquarters, that the officer failed to mention that the statement could be used as evidence in court against him. The respondent submits that petitioner had been repeatedly given his rights as stated in *Miranda* v. *Arizona, supra,* and that such verbatim repetition is generally held to be unnecessary. See *Maguire* v. *U. S.,* 396 F.2d 327 (9th Cir. 1968); *Miller* v. *U. S.,* 396 F.2d 492 (8th Cir. 1968); *U. S.* v. *Mansfield,* 381 F.2d 961 (7th Cir. 1967), and *Moreno* v. *State,* Okla. Cr., 504 P.2d 1241 (1972).

Petitioner further contends that his statement on the evening of February 12, 1973, was inadmissible because of his emotional state. The State, however, submits that the record reveals and as the trial court ruled in the Jackson-Denno hearing (Tr. 233), that defendant's nervousness was precipitated by his own statement (Tr. 297 and 329) that he killed Mrs. Shaw or was responsible for her death, and not the other way around. Agent Lovett testified (Tr. 336) that petitioner was again advised of his rights (Miranda warnings) which he read and signed; that petitioner appeared calm and had control of his faculties and gave direct responses to the questions and that petitioner initialed each

page and signed the statement on the back (State's Exhibit No. 340).

Petitioner's third contention is that his statements were inadmissible because he was allegedly suffering from withdrawal of heroin and was under the influence of the drug valium when he made such statements. With this contention the respondent cannot agree. There is no evidence presented by petitioner which sufficiently shows that petitioner's will was overborne. On the contrary, the record reveals that even petitioner's expert witness at the motion to suppress was not sure what effect valium would have on a heroin addict nor the effect on heroin withdrawal nor even petitioner's tolerance to the drug (Motion Transcript, page 164). Furthermore, the trial court stated in its ruling on the Jackson-Denno hearing (Tr. 215-217):

> ". . . The Court finds that the defendant was fully advised of his rights under Miranda prior to his Exhibit No. 36, and including Exhibit No. 36; that he fully understood those rights, and that he voluntarily and intelligently waived these rights prior to agreeing to show where this body was; that such statements were voluntarily and intelligently made, and the acts that he performed in accordance therewith were voluntarily and intelligently done; that none of them was given or done at a time when the defendant's will was overborne, and that each was the product of a rational intellect and a free will. In regard to these items the Court specifically finds that there was no withdrawal from drugs affecting the defendant during this period sufficient to overbear the defendant's will. We have a number of doctors' statements. The doctor from the hospital at Norman indicated if he had been in withdrawal it would have shown up on the 15th when he was over there, the Court finds that the valium pre-

scribed by Dr. McDougal, taken by the defendant at this time, during this period, shortly before this time, did not sufficiently affect the defendant's mental processes to cause his will to be overborne or to prevent his subsequent statements, actions or omissions and acts from being the product of a rational intellect and free will. Now, that is in regard to Exhibit No. 36.

"Now, in regard to Exhibit No. 37 and No. 38. This involves another Miranda warning given at 7:50 on the night of February 13th. This is after the defendant had been up to the southwest corner of Canadian County; at about 6:20 on the way back he took two more valium tablets. It might have been 6:10. It was shortly after 6:00; he took two more of these ten milligram valium tablets, and then they had stopped out at George's Steakhouse, at which time there the defendant had eaten a regular meal of ribs. After they finished eating out there, then they came down to the Sheriff's Office and that is when this No. 37 and No. 38 was done. Now, again, we have all the statements of the officers of the defendant's actions, we have the statements of the doctors who stated that if he had been under withdrawal it would have shown up on the 16th when they examined him on the morning of the 16th. There is no evidence that I could find of any withdrawal as such, other than certain statements made by the defendant himself. Dr. Harrison had examined him on the morning of the 13th out at the hospital and didn't see any evidence, any symptoms of it. He admitted that he didn't know what the symptoms were but when asked the specific symptoms that the other doctors had stated were symptoms, he said that he didn't notice any. So, in regard to the last two items, again, the Court finds to the Court's satisfaction that the defendant had been fully advised of his rights under Miranda, and Exhibit No. 37; that he fully understood his rights under Miranda; that he voluntarily and intelligently waived his rights prior to making the statement.

"In regard to Exhibit No. 38, it is the Court's conclusion that it was voluntarily and intelligently made; that it was not given at a time when defendant's will was overborne, and it was a product of a rational intellect and a free will.

"The Court specifically finds in regard to these two exhibits that there was no withdrawal from drugs affecting the defendant during this period that was sufficient to overbear defendant's will; that the valium prescribed by Dr. McDougal and taken by defendant during this period—now, this made a total of four of those tablets, two of them at 3:40 and two at 6:10—spaced during all this period of activity—did not sufficiently affect the defendant's mental processes to cause his will to be overborne or to prevent such statements and this waiver of his constitutional rights under Miranda being the acts and product of a rational intellect and a free will, the Court finds that they were voluntarily and intelligently made."

The respondent submits that it has been held that the question of voluntariness or of confessions or consent to search is a question of fact and that being under the influence of narcotics does not necessarily preclude giving voluntary consent to search. *People* v. *Garcia*, 38 Cal.Rptr. 670 (1964).

The Court in *Ortiz* v. *United States*, 318 F.2d 450 (1963), stated:

"Records in narcotics case failed to sustain contention that confession was invalidated because defendant was experiencing withdrawal symptoms at time of questioning where record gave no indication that the influence of narcotic drugs affected his ability to comprehend questions or that he was incoherent. Narcotic Drugs Import and Export Act, Section 2(c), (f) 21 U.S.C.A. §174: 18 U.S.C.A. §3231."

The petitioner also contends that the searches of petitioner's apartment and automobile were invalid because of the reasons heretofore discussed. The respondent, however, submits that the searches were valid and that petitioner voluntarily, knowingly and intelligently waived his rights under *Miranda* v. *Arizona, supra.*

The respondent maintains that the trial court properly ruled on the matter when it stated (Tr. 212):

> "The Court finds this search—in other words you have got a consent to search here, which had been preceded by Miranda warning, and the Court finds that the defendant has been fully advised of his rights under Miranda prior to his consent to search, and that he had voluntarily and intelligently waived those rights, and that he voluntarily and intelligently executed a valid consent to search. Taking into consideration all of the evidence the Court is satisfied with that."

The respondent, therefore, respectfully requests that this Court find the petitioner's contentions herein to be without merit.

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April, 1975

CERTIFICATE OF SERVICE

This is to certify that service of the foregoing Brief in Opposition to Petition for Writ of Certiorari has been served on the following named Counsel of Record this ..... day of ....., by mailing three copies thereof, postage fully paid, to:

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.....

PAUL CROWE